

A Feedmeal Malaysia Sdn Bhd v Teh Cho Yeow & Ors

HIGH COURT (MELAKA) — GUAMAN NO 1-22-119 OF 2000

LOW HOP BING J

8 MAY 2003

B *Civil Procedure* — Rules of procedure — Observance of — Procedural objections on non-compliance with the Rules of the High Court 1980 — Whether objections strictly technical in nature — Whether court should proceed with substantive issues and justice of the case — Rules of the High Court 1980 O 6 r 7(1) and (2A)

C *Civil Procedure* — Writ of summons — Renewal — Writ renewed after it had lapsed — Whether renewal had to be applied before expiry of writ — Whether renewal order was prejudicial to defendants — Whether High Court had powers to grant renewal to prevent injustice

D The defendants applied to set aside: (a) the order allowing the plaintiff to serve the writ of summons ('the writ') and the statement of claim ('the statement of claim') on the first and the fourth defendants by way of substituted service on 2 November 2001; (b) the order renewing the writ for six months from 2 November 2001; (c) the service of the writ and the statement of claim on the first and fourth defendants pursuant to O 12 r 7(1) of the Rules of the High Court 1980 ('RHC'); (d) the respective certificate of non-appearance dated 22 August 2001 against the second and third defendants; and (e) the service of the writ and the statement of claim on the second and third defendants under O 13 r 1 of the RHC. According to the plaintiff's counsel, on 11 January 2001, a clerk from the firm of plaintiff's solicitors ('the clerk') together with a representative of the plaintiff ('the plaintiffs representative')

E went to serve the writ and the statement of claim on the second defendant who was identified by the plaintiff's representative but who declined to accept service. As a result thereof, the clerk left a copy of the writ and statement of claim for the second defendant's attention. On 28 June 2001, the clerk and the plaintiff's representative went to serve the writ and the statement of claim on the third defendant but since the third defendant refused to accept service, the clerk left a copy thereof for the third defendant's attention. After hearing the defendants' application, the learned registrar dismissed it with costs on the ground that the issues raised for the defendants were strictly technical. The defendants appealed.

H **Held, dismissing the appeal:**

I (1) The procedural objections grounded on non-compliance with O 6 r 7(1) and O 6 r 7(2A) of the RHC were strictly technical in nature. Such objections would have been attractive and upheld had there been no subsequent judicial exhortations and recent amendments to the RHC, which had collectively put an end to any reliance on procedural objections based on technical non-compliance with the rules, and to proceed with substantive issues

- and justice of the case. For example, O 1A of the RHC, which took effect on 16 May 2002 vide PU(A) 197/2002 stipulated that in administering any of the rules herein the court or a judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules (see pp 25E–G, 26E); *Beauford Baru Sdn Bhd v Gopala Krishnan all VK Gopalan* [2002] 6 MLJ 134 and *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385 followed. A
- (2) In the instant case, the writ was renewed after it had lapsed on 26 March 2001. Although under O 6 r 7(1) of the RHC, the writ had a life span of six months and under O 6 r 7(2A) of the RHC, a renewal thereof had to be applied for before the expiry thereof, there was nothing in the renewal order which was prejudicial to the defendants as there was no submission that the renewal order had caused prejudice or miscarriage of justice to the defendants. Further, O 3 r 5(1) and (2), and O 92 r 4 of the RHC conferred upon the High Court sufficiently wide powers to grant renewal or extension of time and to prevent injustice or to prevent an abuse of the process of the court (see pp 24A, 26F–H); *Mokhtar bin Amin v Mohamed Mokhtar bin Omar* [2001] 4 MLJ 329 and *Arab-Malaysian Credit Bhd v Tan Seang Meng* [1995] 1 MLJ 525 followed. B
- (3) The affidavit of service revealed that the writ and statement of claim were served on the second defendant by the clerk of the plaintiff's solicitors at the second and the third defendant's addresses on 11 January 2001 and 28 June 2001 respectively but the second and the third defendants had refused to accept it, and hence a copy thereof was left in the second and the third defendants' premises with their attention drawn to it respectively. As such, the learned registrar was justified in his finding that the second and third defendants had attempted to evade service. On the affidavits, he was also justified in holding that the writ and the statement of claim had been personally served on them respectively (see pp 27E–F, 28B–C); *Supreme Finance (M) Bhd v Wing Hong How* [1999] 3 MLJ 114 and *AlliedBank (Malaysia) Bhd v Yau Jiok Hua* [1998] 6 MLJ 1 followed. C
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[Bahasa Malaysia summary]

- Defendan-defendan telah memohon untuk mengenenpikan: (a) perintah yang membenarkan plaintif menyampaikan saman writ ('writ') dan pernyataan tuntutan ('pernyataan tuntutan') ke atas defendan-defendan pertama dan keempat melalui penyampaian gantian pada 2 November 2001; (b) perintah memperbaharui writ tersebut untuk enam bulan daripada 2 November 2001; (c) penyampaian writ dan pernyataan tuntutan tersebut ke atas defendan-defendan pertama dan keempat menurut A 12 k 7(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'); (d) sijil ketidakhadiran bertarikh H
- I

- A** 22 Ogos 2001 terhadap defendan-defendan kedua dan ketiga; dan (e) penyampaian writ dan pernyataan tuntutan tersebut ke atas defendan-defendan kedua dan ketiga di bawah A 13 k 1 KMT. Menurut peguam plaintif, pada 11 Januari 2001, seorang kerani dari firma peguamcara plaintif ('kerani tersebut') bersama seorang wakil plaintif ('wakil plaintif') telah pergi untuk menyampaikan writ pernyataan tuntutan ke atas defendan kedua yang dikenalpasti oleh wakil plaintif tetapi defendan kedua enggan menerima penyampaian tersebut. Akibatnya, kerani tersebut telah meninggalkan satu salinan writ dan pernyataan tuntutan tersebut untuk perhatian defendan kedua. Pada 28 Jun 2001, kerani tersebut dan wakil plaintif telah pergi untuk menyampaikan writ dan pernyataan tuntutan tersebut ke atas defendan ketiga tetapi memandangkan defendan ketiga enggan menerima penyampaian, kerani tersebut telah meninggalkan satu salinan untuk perhatian defendan ketiga. Setelah mendengar permohonan defendan, pendaftar yang bijaksana telah menolaknya dengan kos atas alasan bahawa persoalan-persoalan yang ditimbulkan bagi pihak defendan-defendan hanyalah teknikal. Defendan-defendan telah membuat rayuan.
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- D**

Diputuskan, menolak rayuan tersebut:

- E** (1) Bantahan-bantahan prosedur berasaskan ketidakpatuhan dengan A 6 k 7(1) dan A 6 k 7(2A) KMT bersifat teknikal. Bantahan-bantahan sedemikian adalah menarik dan akan dikekalkan jika tidak terdapat gesaan-gesaan kehakiman baru dan pindaan-pindaan terkini kepada KMT, yang secara kolektif telah menamatkan apa-apa kebergantungan kepada bantahan-bantahan prosedur berdasarkan ketidakpatuhan teknikal kaedah-kaedah, dan diteruskan dengan persoalan-persoalan substantif dan keadilan kes tersebut. Sebagai contoh, A 1A KMT, yang berkuatkuasa pada 16 Mei 2002 melalui PU(A) 197/2002 menetapkan bahawa dalam mengendalikan apa-apa kaedah-kaedah di sini mahkamah atau seorang hakim itu hendaklah memberi perhatian kepada keadilan kes tertentu dan bukan hanya kepada ketidakpatuhan teknikal mana-mana daripada kaedah-kaedah tersebut (lihat ms 25E-G, 26E); *Beauford Baru Sdn Bhd v Gopala Krishnan all VK Gopalan* [2002] 6 MLJ 134 dan *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385 diikuti.
- F**
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- H** (2) Dalam kes semasa, writ tersebut telah diperbaharui selepas ia luput pada 26 Mac 2001. Walaupun di bawah A 6 k 7(1) KMT, writ mempunyai jangka hayat enam bulan dan di bawah A 6 k 7(2A) KMT, satu pembaharuan perlu dipohon sebelum tamat tempoh, tiada apa-apa dalam perintah pembaharuan yang berat sebelah terhadap defendan-defendan kerana tiada apa-apa penghujahan bahawa perintah pembaharuan tersebut telah menyebabkan apa-apa berat sebelah atau ketidakadilan terhadap defendan-defendan. Tambahan pula, A 3 k 5(1) dan (2), dan
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A 92 k 4 KMT memberikan Mahkamah Tinggi kuasa yang luas dan mencukupi untuk membenarkan pembaharuan atau lanjutan masa dan untuk menghalang ketidakadilan atau menghalang satu penyalahgunaan proses mahkamah (lihat ms 24A, 26F–H); *Mokhtar bin Amin v Mohamed Mokhtar bin Omar* [2001] 4 MLJ 329 dan *Arab-Malaysian Credit Bhd v Tan Seang Meng* [1995] 1 MLJ 525 diikuti.

- (3) Affidavit penyampaian menunjukkan bahawa writ dan pernyataan tuntutan telah disampaikan ke atas defendan kedua oleh kerani peguamcara plaintif di alamat defendan-defendan kedua dan ketiga pada 11 Januari 2001 dan 28 Jun 2001 masing-masingnya tetapi defendan-defendan kedua dan ketiga enggan menerimanya, dan oleh itu satu salinan telah ditinggalkan di premis-premis defendan-defendan kedua dan ketiga untuk perhatian mereka kepadanya masing-masingnya. Oleh itu, pendaftar yang bijaksana mempunyai justifikasi dalam penemuan beliau bahawa defendan-defendan kedua dan ketiga telah cuba mengelakkan penyampaian. Berhubung affidavit-afidavit tersebut, beliau juga mempunyai justifikasi dalam memutuskan bahawa writ dan pernyataan tuntutan tersebut telah disampaikan secara peribadi ke atas mereka masing-masingnya (lihat ms 27E–F, 28B–C); *Supreme Finance (M) Bhd v Wing Hong How* [1999] 3 MLJ 114 dan *AlliedBank (Malaysia) Bhd v Yau Jioek Hua* [1998] 6 MLJ 1 diikuti.]

Notes

For cases on observance of rules of procedure, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5201–5202.

For cases on renewal of writ of summons, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 6603–6617.

Cases referred to

AlliedBank (Malaysia) Bhd v Yau Jioek Hua [1998] 6 MLJ 1 (folld)
Arab-Malaysian Credit Bhd v Tan Seang Meng [1995] 1 MLJ 525 (folld)

Beauford Baru Sdn Bhd v Gopala Krishnan a/l VK Gopalan [2002] 6 MLJ 134 (folld)

Blundell v Rimmer [1971] 1 All ER 1072 (refd)

Chin Kon Nam & Anor v Chai Yun Phin Development Sdn Bhd [1996] 4 MLJ 271 (refd)

Kenneth Allison Ltd & Ors v AE Limehouse & Co [1991] 3 WLR 671 (refd)

Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd [2002] 1 MLJ 385 (refd)

Mokhtar bin Amin v Mohamed Mokhtar bin Omar [2001] 4 MLJ 329 (folld)

- A** *Seloga Jaya Sdn Bhd v Pembinaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 96 (refd)
Sim Seoh Beng & Anor v Koperasi Tunas Muda Sungai Ara Bhd [1995] 1 MLJ 292 (refd)
Supreme Finance (M) Bhd v Wing Hong How [1999] 3 MLJ 114 (folld)
- B** *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 (refd)

Legislation referred to

- C** Rules of the High Court 1980 O 1A, O 3 r 5(1), (2), O 6 r 7(1), (2A), O 10 r 1(1), O 12 r 7(1), O 13 r 1, O 62 rr 1, 3, O 92 r 4
- SY Lee (ST Lee & Partners)* for the plaintiff.
Stephanie SF Yong (Yap Koon Roy & Assoc) for the defendants.

Low Hop Bing J:

- D** *Factual background*

On 24 April 2002, vide encl (20), the defendants applied to set aside:

- E** (1) the order allowing the plaintiff to serve the writ of summons dated 27 September 2000 ('the writ') and the statement of claim dated 25 September 2000 ('the statement of claim') on the first and the fourth defendants in the action herein by way of substituted service on 2 November 2001;
- (2) the order renewing the writ for six months from 2 November 2001;
- F** (3) the service of the writ and the statement of claim on the first and the fourth defendants pursuant to O 12 r 7(1) of the Rules of the High Court 1980 ('the RHC');
- (4) the respective certificate of non-appearance dated 22 August 2001 against the second and the third defendants; and
- G** (5) the service of the writ and the statement of claim on the second and the third defendants under O 13 r 1 of the RHC.

(For ease of reference, all orders and rules stated in this judgment are the orders and rules in the RHC)

- H** After hearing the defendants' application, the learned registrar dismissed it with costs on 6 September 2002, basically on the ground that the issues raised for the defendants were strictly technical.

Submission for defendants

- I** Miss Stephanie SF Yong, learned counsel for the defendants, submitted that the order for substituted service dated 2 November 2001 ('the SS order') was irregular, defective and invalid due to the lapse of the six-month validity period of the writ on 26 March 2001, it having been issued on 27 September 2000. Reliance was placed on the amended O 6 r 7(1) vide

PU(A) 342/2000 with effect from 21 September 2000 which, she added, as a special provision should prevail over the general provision in O 3 r 5. **A**

Similarly, she stressed that the order renewing the writ from 2 November 2001 ('the renewal order') was irregular, etc as the application was made on 22 August 2001 which was after the lapse of the writ on 26 March 2001, thereby not complying with the amended O 6 r 7(2A) effective from 21 September 2000. **B**

It was submitted that the certificate of non-appearance ('CNA') against the second defendant was filed on the basis of the service of the writ on the second defendant at 5pm on 11 January 2001 when the second defendant was not at the address at Batu 29, Sungai Dua, Asahan, 77100 Melaka ('the address'), but was instead working in Kuala Lumpur, and the punch card was produced. **C**

She argued that O 10 r 1(1) of the RHC requires service on the second defendant personally or by sending it by prepaid AR registered post addressed to his last known address and that personal service as provided for in O 62 r 3 of the RHC has not been complied with. **D**

It was contended that this CNA against the third defendant was based on a lapsed writ which was purportedly served on the third defendant at 6pm at the address on 28 June 2001 when the third defendant was working in Kuala Lumpur and that again there was non-compliance with O 10 r (1) and O 62 r 3 of the RHC. **E**

In relation to O 92 r 4 of the RHC, it was contended that it only confers the jurisdiction to extend time, for an application which is regular, as the court has to do justice.

Contention for plaintiff

Miss SY Lee, learned counsel for the plaintiff, contended that the writ was regular and that on 11 January 2001, a clerk from the firm of plaintiff's solicitors ('the clerk') together with a representative of the plaintiff ('the plaintiff's representative') went to the address to serve the writ and the statement of claim on the second defendant who was identified by the plaintiff's representative but who declined to accept service, as a result of which the clerk left a copy thereof for the second defendant's attention. **F**

She added that on 28 June 2001, the clerk and the plaintiff's representative went to the address to serve the writ and the statement of claim on the third defendant but since the third defendant refused to accept service the clerk left a copy thereof for the third defendant's attention. **G**

In respect of the first and the fourth defendant, it was submitted that since the clerk did on 11 January 2001 and 28 June 2001 attempt unsuccessfully to effect personal service on them, the plaintiff had applied for and obtained the SS order and the renewal order. **H**

She relied on O 3 r 5 of the RHC and requested the court to exercise inherent jurisdiction under O 92 r 4 of the RHC, as the defendants were attempting to evade service. **I**

A *Decision on appeal*

Rehearing

The appeal before me as judge in chambers is to proceed by way of rehearing and to deal with it as a hearing for the first time: *Chin Kon Nam & Anor v Chai Yun Phin Development Sdn Bhd* [1996] 4 MLJ 271; *Seloga Jaya Sdn Bhd v Pembinaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 96; *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30; *Blundell v Rimmer* [1971] 1 All ER 1072.

C Latest procedural law

While both the learned counsel have referred to the amendment contained in O 6 r 7(1) and O 6 r 7(2A) vide PU(A) 342/2000 which took effect from 21 September 2000, they seem to have missed the opportunity to update themselves with the more recent amendment to the RHC vide PU(A) 197/2002 which came into force on 16 May 2002. The importance and impact of this recent amendment will be intimated later in this judgment.

The on-going exercise of keeping abreast and updating oneself with the latest development in the law is a virtue and indeed a second nature of an advocate and solicitor, especially in one's early professional practice, so that a sound starting point may be established in order to enhance one's competence in and to eradicate one's ignorance of the law.

SS and renewal orders and service on first, third and fourth defendants

The procedural objections grounded on non-compliance with O 6 r 7(1) and O 6 r 7(2A) are in my view strictly technical in nature. Such objections would have been attractive and upheld had there been no subsequent judicial exhortations and recent amendments to the RHC, which have collectively put an end to any reliance on procedural objections based on technical non-compliance with the rules, and to proceed with substantive issues and justice of the case.

In *Beauford Baru Sdn Bhd v Gopala Krishnan all VK Gopalan* [2002] 6 MLJ 134, at pp 139–140, I said:

As we move towards the era of facilitating the process of litigation, the raising of preliminary objection on technical grounds would certainly and clearly be a thing of the past. Quite recently, the Court of Appeal in *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* [2001] 1 MLJ 561 through the authoritative judgment of Ahmad Fairuz JCA (now Ag President of the Court of Appeal and Chief Judge (Malaya)) expressly stated that preliminary objection on a mere technicality should not be allowed to obstruct the process of giving justice to the deserving. The Court of Appeal had no hesitation in overruling the procedural technical objection. This principle is further manifested in the parallel and equipollent provisions in r 3A of the Rules of the Court of Appeal (Amendment) 2002 (PU(A) 196/2002) and O 2 r 3 of the Rules of the High Court (Amendment) 2002 (PU(A) 197/2002) both of which came into force on 16 May 2002 in the following terms:

Preliminary objection on the ground of non-compliance shall not be allowed A

3A A Court or Judge shall not allow any preliminary objection by any party only on the ground of non-compliance of any of these Rules unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice.

Preliminary objection for non-compliance of rules not allowed (O 2 r 3) B

3 A court or judge shall not allow any preliminary objection by any party to any cause or matter or proceedings only on the ground of non-compliance of any of these Rules unless the court or judge is of the opinion that such noncompliance has occasioned a substantial miscarriage of justice. C

It is clearly the intention and wisdom of the Rules Committee to provide for smooth administration of the due process of litigation and the administration of justice by way of substantial merits of the case and not on merely procedural technical objections. In my considered opinion, the advent of these amendments would mark the beginning of the end of learned counsel's urge to raise objections merely on strictly technical grounds and it is my fervent hope that learned counsel's preliminary procedural technical objections would henceforth be consigned to oblivion for good. D

(see also *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385 (FC))

Further O 1A of the RHC, which took effect on 16 May 2002 vide PU(A) 197/2002 provides as follows: E

In administering any of the rules herein the court or a judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein.

Although under O 6 r 7(1), the writ has a life span of six months and under O 6 r 7(2A) a renewal thereof has to be applied for before the expiry thereof, there is nothing in the renewal order which is prejudicial to the defendants as there was no suggestion or submission that the renewal order has caused prejudice or miscarriage of justice to the defendants eg by way of limitation to render the plaintiff's cause of action statute-barred. F

In *Mokhtar bin Amin v Mohamed Mokhtar bin Omar* [2001] 4 MLJ 329, the Court of Appeal held, inter alia, that non-compliance with procedural requirements should not be treated as invalidating any action or other proceeding or step taken therein unless it occasions a substantial miscarriage of justice. G

Order 3 r 5(1) and (2), and O 92 r 4 of the RHC confer upon our High Court sufficiently wide powers to grant renewal or extension of time and to prevent injustice or to prevent an abuse of the process of the court. Both these provisions are respectively reproduced as follows: H

5 Extension, etc of time (O 3 r 5)

(1) The court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by these rules or by any judgment, order or direction, to do any Act in any proceedings. I

A (2) The court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.

4 Inherent powers of the court (O 92 r 4)

B For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

C A case in point under O 3 r 5 and O 92 r 4 of the RHC is *Arab-Malaysian Credit Bhd v Tan Seang Meng* [1995] 1 MLJ 525 in which the issue was whether it was permissible for the court to grant a series of 12-month extensions to resuscitate a writ which had expired in August 1986. The learned registrar answered it in the affirmative while the learned judge on appeal held in the negative but the Court of Appeal upheld the learned registrar's decision, the reason being that there is wide power under O 3 r 5 of the RHC conferred upon the High Court to extend time, and under O 92 r 4 of the RHC, the inherent jurisdiction to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court. The Court of Appeal reiterated that a rule of court should not be construed so as to produce unfairness or a manifest injustice: see also *Sim Seoh Beng & Anor v Koperasi Tunas Muda Sungai Ara Bhd* [1995] 1 MLJ 292.

E Service on second and third defendants

F The affidavit of service revealed that the writ and statement of claim was served on the second defendant by the clerk of the plaintiff's solicitors at the second and the third defendants' addresses on 11 January 2001 and 28 June 2001 respectively but the second and the third defendants had refused to accept it, and hence a copy thereof was left in the second and the third defendants' premises with their attention drawn to it respectively.

The procedural law on personal service is contained in O 10 r 1 and O 62 r 1 of the RHC in the following words:

G 1 General provisions (O 10 r 1)

(1) Subject to the provisions of any written law and these rules, a writ must be served personally on each defendant or by sending it by prepaid AR registered post addressed to his last known address and so far as is practicable, the first attempt at service shall be made not later than one month from the date of issue of writ.

H 1 When personal service required (O 62 r 1)

(1) Any document which by virtue of these rules is required to be served on any person need not be served personally unless the document is one which by an express provision of these rules or by order of the court is required to be so served.

I In *Supreme Finance (M) Bhd v Wing Hong How* [1999] 3 MLJ 114, our Court of Appeal followed the decision of the House of Lords in *Kenneth Allison Ltd & Ors v AE Limehouse & Co* [1991] 3 WLR 671 'that personal

service required the handling of the document to the person to be served or telling him what it contained and leaving it with or near him;’.

In *AlliedBank (Malaysia) Bhd v Yau Jioh Hua* [1998] 6 MLJ 1, Augustine Paul JC (now J), in defining what constitutes personal service referred to *The Supreme Court Practice* [1985] Vol 1, p 996 as follows:

To effect personal service, the clerk or other person entrusted with the task should first satisfy himself that he has found the right man. He should then hand to or leave with the person to be served a copy of the writ. If the person served will not take the copy, he should tell him what it contains and leave it as nearly in his possession or control as he can.

It seems clear to me that the learned registrar is justified in his finding that the second and third defendants have attempted to evade service. On the affidavits, he is also justified in holding that the writ and the statement of claim have been personally served on them respectively.

Conclusion

On the foregoing grounds, I hold that the learned registrar’s decision is correct and I hereby affirm it. Hence, the defendants’ appeal is dismissed with costs.

Reported by Lim Lee Na

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